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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 435

GEORGE A. MURDOCK, *Petitioner*

v.

STATE OF MARYLAND, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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IN THE

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No.

GEORGE A. MURDOCK, *Petitioner*

v.

STATE OF MARYLAND, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

George A. Murdock prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered on May 29, 1964, "Dismissing the Indictment Reversed and case remanded for further proceedings."

OPINIONS BELOW

On September 24, 1963 the Circuit Court for Prince George's County, Maryland dismissed the indictment against the Petitioner (R. 43-48). This judgment was reversed by the Maryland Court of Appeals on May 29, 1964, 200 A. 2d 666 and this Appellate judgment is printed in Appendix A, hereto.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on May 29, 1964. The jurisdiction of this Court is invoked under 28 USCA 1257 (3).

QUESTIONS PRESENTED

1. Whether the 6th Amendment to the Constitution of the United States secures to the Petitioner a right to a "speedy trial" when being prosecuted in a State Court.

2. Whether inaction on the part of a Petitioner after denial of his motion for an "immediate trial" constitutes a waiver of his right to a speedy trial.

3. Whether, after dismissal by the trial court of an indictment for failure to grant a speedy trial, it is the function of the appellate court to determine "if the indictment was properly dismissed" or must the appellate court first find an abuse of discretion on the part of the trial court before reversing the judgment of the trial court.

* * * *

STATUTES INVOLVED

The Sixth Amendment to the Constitution of the United States and Article 21, Maryland Declaration of Rights. They are printed in Appendices B and C, respectively.

STATEMENT

On June 29, 1962, an indictment, charging Petitioner and another defendant with six counts of conspiracy in connection with Free State Savings and Loan Association, Inc., was filed in the Circuit Court for Prince George's County (R 1-2). On July 20, 1962, Peti-

tioner acknowledged receipt of a copy of the indictment, was advised of his right to counsel, was arraigned and pleaded not guilty and elected a jury trial (R 1-2). An appearance was entered by counsel for Petitioner, bond was set at $2,000, the bond was filed, and Petitioner was released on Bond. On July 30, 1962 the Petitioner filed the following motions:

1. Motion for Bill of Particulars (R 11-13).

2. Motion for Discovery and Inspection (R 15-16).

3. Motion for Immediate Trial (R 17).

On August 14, 1962, the Respondent filed the following papers in the case:

1. Exception to Motion for Bill of Particulars (R 19).

2. Exception to Motion for Discovery and Inspection (R 18).

3. Exception to Motion for Immediate Trial (R 20).

On October 29, 1962 a hearing was held on all pending motions and the exceptions thereto, before Judge Roscoe H. Parker in the Circuit Court for Prince George's County. The motion for discovery and inspection and the motion for bill of particulars were both granted and then consideration was given to the motion for an immediate trial and there was the following colloquy between the court and counsel:

> "(Mr. O'Malley) (Counsel for Defendant): . . . There is a motion for speedy trial as regards the defendant George A. Murdock in Criminal Trials Number 4290, and that is tied in somewhat with a further item as regards the bill of particulars.
>
> "(The Court) Have you asked for a bill of particulars?

"(Mr. O'Malley) Yes, in both cases, Your Honor.

"(The Court) You can't get a trial until you get that, can you?

"(Mr. O'Malley) No, sir.

"(The Court) I think you have to have a speedy trial, but you can't get it until you get all the preliminaries out of the way that you are asking for.

"(Mr. O'Malley) Now, in the determination by Your Honor when is the bill of particulars due?

"(The Court) How much time will you need, Mr. Kahler?

"(Mr. Kahler) (State's Attorney) May it please the Court, I have no one that I can give this case to. I have got to handle all this my self. I have a grand jury coming in here next month and I am trying to get that out of the way so that—

"(The Court) Are these people under bond?

"(Mr. Kahler) Yes, sir. They are out on bond. And really from the State's standpoint it is going to be impossible to give these people a trial until February or March, at the earliest, of next year.

"I would like to have at least forty-five days to comply with the particulars that the defendant requests. I know that is a little longer than ordinary, but this is not an ordinary case, and it requires a great deal of work and a great deal of time on my part in order to satisfy the demand.

"(The Court) Is that agreeable, Mr. O'Malley?

"(Mr. O'Malley) Your Honor, I don't want to say that is agreeable, nor do I want to appear difficult. But we did file the motion, or all of these motions, on July 30th, I believe, of this year, and they weren't set down for hearing until almost three months later. So in order to protect that

motion I am not in a position to say to the Court that I agree to this request for forty-five days.

"(The Court) I think it is a reasonable time. And in view of the demand having been made upon the State's Attorney, he can't do the impossible. And your man is not suffering because he is out on bail. There is no showing to the Court that he is suffering in any respect so I will allow the State forty-five days.

"Does that conclude the matter?

"(Mr. O'Malley) Yes, Your Honor. Thank you very much."

The Respondent filed an Answer to the motion for a bill of particulars (R 21, 22) and an Answer to motion for discovery (R 23-25) on December 13, 1962.

Nothing more having been done, the Petitioner, on August 21, 1963, filed a motion to dismiss the indictment (R 27-30) together with an affidavit in Support of Motion to Dismiss (R 27-30). The Respondent filed nothing of a factual nature in explanation of or mitigation for the delay.

On September 12, 1963, there was a hearing in open court before Judge Ralph W. Powers on the Motion to Dismiss Indictment at which no testimony was taken. Judge Powers took the matter under advisement and on September 24, 1963, filed the Opinion and Order (R 43-48) granting the Motion to Dismiss the Indictment.

The Respondent appealed to the Court of Appeals of Maryland, the case was arguel on April 9, 1964 and on May 29, 1964 the Court handed down a unanimous opinion holding in substance as follows: "We hold that the appellee's course of inaction after the denial

of his motion for an 'immediate trial' . . . was such as to constitute a waiver of his right to a speedy trial. Upon remand, he, of course, will be entitled to a prompt and speedy trial, if he requests one." 200 A. 2d 666 at page 670.

REASONS FOR GRANTING WRIT

1. The central question in this petition is whether the trial court's conduct in dismissing an indictment against the Petitioner, for denial of his right to a speedy trial under both the Sixth Amendment of the Constitution of the United States and Article 21 of the Maryland Declaration of Rights, was properly reversed by the Maryland Court of Appeals.

It is the Petitioner's contention that the "speedy trial" protection of the Sixth Amendment of the Constitution applies to a person on bond as well as one incarcerated. And that when such person demands a "speedy trial" on July 30, 1962, within ten days of the time of his arraignment, that there is some compulsion on the part of both the State and the court to take action prior to September 24, 1963 toward satisfying that demand and their failure to so act deprives the defendant of a basic right protected by the Sixth Amendment of the Constitution.

The reasons for granting this writ are best advanced by this Court in the case of *Mapp* v. *Ohio,* 367 U.S. 643 (1961)

> "We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."

And later in the same opinion:

> "Having once recognized that the right to privacy embodied in the Fourth Amendment is en-

> forceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

The trial court in dismissing the indictment against the Petitioner said: "It is concluded that under both the Sixth Amendment to the Constitution of the United States and Article 21 of the Maryland Declaration of Rights, the defendant has not received a speedy trial, which amounts to denial of his Constitutional rights, thus the indictment against him should be dismissed." The court apparently following the implications of *Mapp* v. *Ohio,* cited supra, had no inhibition in making the protections of the Sixth Amendment directly applicable to the States with little apparent concern for the admonitions of caution contained in *Ker* v. *California,* 374 U.S. 23, June 10, 1963. The trial court's apparent lack of concern was the essence of realism for it is the passage of time which deprives one of a speedy trial, and the same criterion should be employed whether through the Sixth Amendment of the Fourteenth Amendment of the Constitution or Article 21 of the Maryland Declaration of Rights. It is difficult to comprehend that this concept can present the prob-

lems of state versus federal application inherent in the protections afforded by the Fourth Amendment.

The Petitioner, in seeking review by this Court, follows the directive of *Cleary* v. *Bolger,* 371 U.S. 392 (Jan. 14, 1963):

> "To the extent that such rights have been violated, cf., e.g. *Mapp* v. *Ohio,* supra, he may raise the objection in the state courts and then seek review in this Court of an adverse determination by the New York Court of Appeals. To permit such claims to be litigated collaterally, as is sought here, would in effect frustrate the deep-seated federal policy against piecemeal review."

This Court has determined that the right to assistance of counesl protected by the Sixth Amendment of the Constitution is a right which is "fundamental and essential to a fair trial", *Gideon* v. *Wainwright, Corrections Director,* 372 U.S. 335, (Mar. 18, 1963). The Court further said:

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." *Grosjean* v. *American Press Co.,* 297 U.S. 233, 243-244 (1936).
>
> "And again in 1938 this Court said: (The assistance of counsel) is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental rights of life, and liberty . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'." *Johnson* v. *Zerbst,* 304 U.S. 458, 462 (1938). To the same effect,

see *Avery* v. *Alabama,* 308 U.S. 444 (1940) and *Smith* v. *O'Grady,* 312 U.S. 329 (1941).

The right of "speedy trial" is as fundamental a right as are those considered in *Mapp* v. *Ohio,* cited supra; and as regards the other rights enunciated in the Sixth Amendment it is as fundamental as is the right of counsel considered in *Gideon* v. *Wainwright,* indeed, it is an integral part of the Sixth Amendment.

The problem of "speedy trial" has recently been considered by the District of Columbia Circuit Court of Appeals, *Smith* v. *United States,* 331 F. 2d 784, (Feb. 20, 1964). The court held an "en banc" hearing, in which the court divided five to four, after a panel of the court had previously decided that the defendant had been denied a "speedy trial" where there was a delay of 102 days between indictment and trial. The full court reversed its own panel and affirmed the lower court. That case differs from this in that the defendant in that case was incarcerated and the Petitioner was on bond; there the defendant contributed to the delay whereas the Petitioner herein contributed in no way to the delay and resisted delay whenever there was occassion to do so. The majority did, however, reverse the judgment of the lower court for its failure to instruct on "entrapment" but even this concession did not dissuade the minority of four judges who insisted that the case should have been reversed for failure to grant defendant a speedy trial.

The Petitioner herein complains of delay practically from the time of arraignment to the time of the trial court's order of dismissal, a period of 431 days; all but ten days of which were caused by the Respondent or the court after the Petitioner had made a demand for an immediate trial.

2. The Maryland Court of Appeals in ruling that "inaction on the part of a defendant after the denial of his motion for an 'immediate trial' constitute a waiver of his right to a speedy trial," has contravened previous decisions of its own as well as the prevailing rule in the federal jurisdictions.

A long line of Maryland cases including: *Rigor* v. *State,* 101 Md. 465, 61 A. 631, *State* v. *Thompson,* 81 A. 2d 596, *Tutt* v. *Warden,* 87 A. 2d 523, and *Auger* v. *Warden,* 99 A. 2d 735 stand for the proposition that a speedy trial must be requested before a defendant can allege that he has been prejudiced by a denial of a speedy trial.

No case has been found in Maryland where, upon a motion for a speedy trial having been requested, it was denied by a trial court. And as the trial court's opinion stated: "It may be concluded from the above that any Maryland cases in which the denial of a speedy trial was held to be a deprivation of the defendant's constitutional rights were disposed of at the nisi prius level and did not reach the Court of Appeals."

An import and case on the question of "speedy trial" was *Harris* v. *State,* 71 A. 2d 36, 194 Md. 289 wherein the authorities were reviewed on the question of speedy trial and it was decided: "A sovereign may not deny an accused of a speedy trial even though he is incarcerated in one of the sovereign's penal institutions under a prior conviction and sentenced in a Court of the Sovereign."

The decision of the Maryland Court of Appeals herein has departed from the past criterion of "waiver" and in effect says that you now must make two demands for a speedy trial otherwise you have waived your constitutional right.

The federal circuit courts of appeals have been less strict than even the Harris case and its descendants, in that they have found deprivations of one's right to a speedy trial where there has been no demand for a speedy trial. *Taylor* v. *United States,* 238 F. 2d 259 (1956), *U. S.* v. *McWilliams,* 163 F. 2d 695.

In a case in the District Court for the State of Maryland the authorities on the question of "speedy trial" were very effectively summarized, *Provoo* v. *U. S.,* United States District Court, District of Maryland, 17 F.R.D. 183, (decided March 14, 1955).

> "The period fixed in many of the early statutes was substantially the same as that in the British Habeas Corpus Act, and in many cases defendants were discharged if trial was not had within the specified period. The right was accorded to a slave charged with rape, as well as the free men charged with capital and other serious crimes. Some judges seem to have felt that the accused should be discharged no matter what caused the delay, unless it was caused by the accused, others felt that discharge would be refused where the delay was not the fault of the prosecution. Judge Tod, Speaking for the Supreme Court of Pennsylvania in 1827 said:
>
> 'I think it was intended to provide against the abuse of a protracted trial, to provide not only against the malice of a prosecutor, but against his negligence, against all his delays whether with cause or without cause, against every possible act, or want of action of the prosecutor; but not to shield a prisoner in any case from the consequences of any delay made necessary by the law itself.'
>
> "When a person charged with crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable except only that

which is necessary for proper preparation and to secure the attendance of witnesses. (Cooley, Constitutional Limitations (8th Ed., 1927, Volume 1, p. 645).

"This rule was applied in U. S. v. Fox, Supreme Court of Montana, 1880, 3 Mont. 512, where the indictment was returned at the November Term 1879 the defendant was tried at that term but the jury disagreed; a second trial at that term resulted in a mistrial because a juror became sick; and the government did not supply funds for the next term. The court held that the prosecution had been guilty of laches and neglect of duty in failing to prosecute, that such failure was a denial to the defendant of his constitutional rights, and that he should be discharged.

"The same rule has been applied with the same result in many state cases. The defendants were not required to show prejudice in fact. Prejudice may arise from the restraint on liberty for an unreasonable length of time before a conviction, from the harassment of criminal prosecution and anxiety resulting therefrom and from the possible loss of witnesses by reason of faded memory and inability to locate them."

And finally on the question of waiver, *Taylor* v. *United States,* 238 F. 2d 259, 99 Aps. D.C. 183, (1956) quoted with approval *Johnson* v. *Zerbst,* (1938) 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 "There is to be borne in mind the admonition of the Supreme Court that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights."

3. The Appellate Court erred in the phrasing of its question on appeal: "the only question posed for our

determination is whether, upon the facts presented, the indictment was properly dismissed," and its conclusion was therefore also erroneous.

In this case, on the trial level, there was a demand for an immediate trial, a denial of a speedy trial, a motion to dismiss by the petitioner together with his affidavit. The respondent contravened the petitioner's pleadings in no regard and offered nothing in the way of justification or mitigation for the delay in the trial. Contrary to the possible inference to be gained from the decisions of either or both courts there was nothing of an evidentiary nature to the effect that "the case is unusually complicated and a representative from the Attorney General's Office who is to assist in the trial has not been available"; or, that there had been a change in State's Attorneys between October 1962 and August of 1963."

Rather should the court of Appeals of Maryland have framed its question: "did the trial court act improperly in granting the Petitioner's motion to dismiss?" This would be consonant with the brief of Respondent on appeal in the Court of Appeals of Maryland and also with the authorities, *Nickens* v. *U. S.*, 323 F. 2d 808, 116 U.S. Aps. 112, (June 27, 1963)

> "A motion to dismiss under Rule 48 (b) is addressed to the sound discretion of the trial court, and when such motion is granted, that action will be sustained unless the trial court is shown to have acted in an arbitrary and clearly unreasonable manner."

The case of *United States* v. *Patrisso,* 21 F.R.D. 363 (S.D. N.Y., 1958) cited with approval in the Appellate decision in this case, cited supra, Appendix A., was an

affirmation of the exercise of the discretion by the lower court in denying defendant's motion for dismissal on the grounds of denial of a speedy trial. No case has been found wherein an appellate court has reversed a lower court's dismissal of an indictment on the grounds of denial of a speedy trial.

"The question for decision on the appeal, *U. S.* v. *McWilliams et al.*, 163 F. 2d 695, 82 U.S. Aps. D.C. 259 (June 30, 1947) is (a) whether an action on a motion to dismiss for lack of prosecution is within the sound judicial discretion of the trial judge (b), if so, under what circumstances may its exercise be controlled on appeal? The answer to the first query is obvious, not only from the provisions of the New Criminal Rules 18 U.S.C.A. following section 687, but also by the general recognition of the right prior to their enactment. Thus Rule 48 (b) provides inter alia, "* * * or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint." . . . . "And the answer to the latter query is equally obvious, since the rule of this jurisdiction is that where there has been a lack of due diligence in the prosecution of a case the trial judge may dismiss and his order will be sustained on appeal, unless there has been a clear abuse of discretion. *Neel* v. *Barbra*, 1943, 78 U.S. Apps. D.C. 13, 136 F. 2d 269. And by the abuse of discretion is meant action which is arbitrary, fanciful or clearly unreasonable. This is also the rule applied by the Supreme Court,—*Continental Ill. Nat. Bank & Trust Co.* v. *Chicago, Rock I. & Pac. R.*, 1935, 294 U.S. 648, 677, 55 S. Ct. 595, 79 L. Ed. 1110; *Burns* v. *United States*, 1932, 287 U.S. 216, 222, 53 S. Ct. 154, 77 L. Ed. 266, and generally followed in other circuits."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

[redacted]

September Term, 1963

State of Maryland

v.

Harold A. Simmons

Brune, C.J.
Hammond
Prescott
Marbury
Sybert,

JJ.

[redacted]

Filed: May 29, 1964

The State has appealed from an order of the Circuit Court for Prince George's County, which dismissed an indictment against the appellee on the ground that he had been denied a speedy trial.

The only question posed for our determination is whether, upon the facts presented, the indictment was properly dismissed.

On June 20, 1962, an indictment containing [illegible] was returned by the Grand Jury charging appellee and [illegible] with misconduct in connection with the operation of [illegible] State Savings and Loan Association, Inc. On June 21, 1962, appellee acknowledged [illegible] copy of the indictment and waived a formal reading thereof. Thereafter, [illegible] appellee's counsel, was arraigned and pleaded not guilty, and elected a jury trial. Trial was set for [illegible] but was postponed on [illegible]

APPENDIX

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 317

SEPTEMBER TERM, 1963

STATE OF MARYLAND

v.

GEORGE A. MURDOCK

BRUNE, C. J.
HAMMOND
PRESCOTT
MARBURY
SYBERT,

JJ.

Opinion by Prescott, J.

Filed: May 29, 1964

The State has appealed from an order of the Circuit Court for Prince George's County, which dismissed an indictment against the appellee on the ground that he had been denied a speedy trial.

The only question posed for our determination is whether, upon the facts presented, the indictment was properly dismissed.

On June 20, 1962, an indictment containing six counts was returned by the Grand Jury, charging appellee and another defendant with conspiracy in connection with the operation of Free State Savings and Loan Association, Inc. On July 20, 1962, appellee acknowledged receipt of a copy of the indictment, was advised of his right to counsel (Thomas M. O'Malley, Esq., entered his appearance for appellee), was arraigned and pleaded not guilty, and elected a jury trial. Bond was set at $2,000, and he was released on bail.

Ten days thereafter, appellee filed three motions: one for a bill of particulars; one for discovery and inspection; and one which requested the "court to grant the defendant herein an immediate trial," based on "Maryland Rules of Procedure, 1961 Edition, Rule 709." On August 14, 1962, within the time prescribed by our Rules, the State filed exceptions to all three of the motions, and on October 29, 1962, a hearing was held before Judge Parker on the motions and exceptions. The first two motions were granted by the court, and then consideration was given to the one for "an immediate trial."

At this point, it should be noted that Maryland Rule 709 was not designed as a substitute for one's constitutional right to a speedy trial under Article 21 of our Bill of Rights. It (with other Rules) was designed to take the place of former Section 592 of Article 27 of the Code (1957), now repealed. It provides that an accused may file a petition stating that he desires to waive his right *to action by the Grand Jury*, and he seeks an immediate trial. (The Rule also grants the right to request an immediate trial by persons praying a jury trial before, or appealing from convictions by, trial magistrates. This, of course, has no application here.) Upon the filing of such a petition, the State's Attorney is required to file an *information* against the accused, except in cases tried upon warrants, and thereafter an accused who has "filed a petition under this Rule shall be tried, without regard to term of court,[1] within such reasonable time as to accord him a speedy trial." As pointed out by Judge Henderson, for

[1] Prior to the enactment of former Section 592, it was the general practice in this State to try appeals from magistrates at the next jury term of the Circuit Courts as well as cases where jury trials were requested; and in cases where the State's Attorneys were required, or desired, to indict, it was necessary (except upon recall of the Grand Jury) to await the next jury term of court for indictment. This, not infrequently, resulted in considerable delay in trials, and, on occasions, caused hardship to persons accused of crime, especially those who were unable to furnish bail.

the Court, in *Heath* v. *State*, 198 Md. 455, the statute (now replaced by the Rules) was enacted for the benefit of accused persons, who had not been indicted, or who had prayed jury trials before, or appealed from the decisions of, trial magistrates, affording them the right, if they desired the same, to more expeditious trials. However, in the case at bar, the accused had already been indicted (a fact apparently overlooked by counsel when the motion was filed), so the Rule does not apply. The above, perhaps, is a complete answer to appellee's claim of denial of a speedy trial, for the motion is the only action taken, or indication, by him that he desired an early trial, and he concedes that in the absence of "a demand or request [for a speedy trial] he is construed to have waived his rights under the Declaration of Rights, Article 21." See *Harris* v. *State*, 194 Md. 288; *Kirby* v. *State*, 222 Md. 421; *Swift* v. *State*, 224 Md. 300; and annotations in 129 A.L.R. 572, at page 587, and 57 A.L.R. 2d 302, at page 326, *et seq.* However, we shall consider his claim from a constitutional viewpoint, as distinguished from a statutory or Rule of Court one (a number of States have statutes, supplementing constitutional provisions, relating to speedy trials), for Article 21 is self executing. *Harris* v. *State, supra.*

It will be noted that appellee moved for an *immediate* trial, and this motion was filed simultaneously with one for a bill of particulars, and one for discovery and inspection. At the hearing on the motions, the court granted the latter two, and informed appellee's counsel that appellee was entitled to a speedy trial, and, upon consideration of the motion for immediate trial, the court asked appellee's counsel, "you can't get a trial until you get that [the bill of particulars], can you?" To which counsel replied, "No, sir." Then upon request of the State's Attorney, which was not consented to, nor objected to, by appellee's attorney, the court granted the State forty-five days within which to comply with the two motions granted, as the appellee was out on bond and the State's Attorney had a

Grand Jury convening shortly thereafter. After granting the forty-five days, the court inquired, "Does that conclude the matter?" Appellee's counsel replied, "Yes, Your Honor. Thank you very much." The appellee now contends that his "motion for an immediate trial was neither granted nor denied formally." Just what he means by the word "formally" is not perfectly clear, but we think that what has been stated above *makes it clear that his motion for "an immediate" trial was denied,* and we shall point out below that thereafter, down to the date of his motion to dismiss the indictment, the appellee, by words, letters, pleadings, or actions, gave no indication to the court or the State's Attorney that he desired his trial to take place (and, of course, his motion to dismiss was not a motion to be tried, but was that he be not tried at all).

The State filed its answers on December 13, 1962, to the two motions that were granted, *so we start from that date,* for the cases are legion which hold that an accused cannot complain of a delay caused by himself. *Harris* v. *State, supra;* cases cited in Annotations in 129 A.L.R. at page 577 and 57 A.L.R. 2d 314. The appellee knew, and acknowledged in his reply to the judge quoted above, that an "immediate" trial was impossible on (or shortly after) October 29th, because of his other motions. After the State's answers were filed, appellee, as we stated above, gave no one any further indication that he desired an early trial, until he filed his motion to dismiss, some eight months thereafter.

The right to a speedy trial guaranteed by the State and Federal Constitutions, even when it is properly demanded, is necessarily relative. Delays, *depending upon circumstances,* sometimes cannot be avoided. It secures rights to an accused, but it does *preclude the rights of public justice. Beavers* v. *Haubert,* 198 U.S. 77. (In the case at bar, the trial court's opinion says that the "State asserts that the case is unusually complicated and a representative from the Attorney General's office who is to assist in the trial has not been available." Also, at argument,

it was stated that there had been a change in State's Attorneys between October, 1962, and August of 1963.) And, even where a defendant has made a proper demand for trial or has moved for his discharge or dismissal of the proceeding's against him, this does not necessarily prevent a ruling that because of subsequent conduct he waived his right to a speedy trial. Annotation, 57 A.L.R. 2d 342. Of course, the delay in completing a prosecution must not be purposeful or oppressive. *Pollard* v. *United States,* 352 U.S. 354. The appellee here steered a course of inaction by which it was difficult for him to worsen his position. He knew an "immediate" trial could not be had until the State filed its answers to his other two motions. He received the answers, was free on bond, and was represented by able, experienced counsel. When the trial date would arrive in due course, he would be properly prepared. But by not pressing for trial (Judge Parker had already told appellee that he was entitled to a speedy trial, and there can be no doubt that he could have had a trial for the asking by a simple request, orally or in writing, to any one of the judges in Prince George's County) his defense would suffer no harm, and, if the prosecution did not actively seek to have the trial set, he could argue, as he did, that he was denied a speedy trial, based upon his denied motion for an immediate trial.

Without unduly prolonging this opinion, we think our conclusion herein is controlled by two previous decisions: *United States* v. *Patrisso,* 21 F.R.D. 363 (S.D. N.Y., 1958), and our case of *Harris* v. *State, supra.* In *Patrisso,* the defendants were indicted in July of 1954. In March of 1957, they moved to dismiss for failure of the Government to prosecute. The motion was denied, and the case was marked "ready and passed," which meant that the case was ready for trial as soon as a judge was available. Nine months elapsed without the Government or the defense making any effort to have the case assigned to a judge. The defendants then filed another motion to dismiss in January of 1958, alleging they had been prejudiced by a

corporations having been dissolved, another corporation's records were no longer available, the scattering of witnesses, etc. The Court pointed out that the defendants had indicated they desired a prompt trial by filing their first motion, but, during the nine months that had transpired since then, they had taken no action to have the case assigned for trial. The Court stated that the second "motion seems more to evidence defendants' desire to avoid the criminal charges against them rather than to secure a speedy trial of those charges," *and that defendants' affidavits did not persuade the Court that the Government had deliberately or oppressively sought delay,* or *that "new and substantial" prejudice had been effected by the delay.* The motion to dismiss was denied.

In *State* v. *McTague,* 216 N.W. 787 (Minn.), which was cited with approval, and quoted from, in *Harris* v. *State, supra,* the Court said:

> "The constitutional and statutory provisions for a speedy trial are for the protection of the defendant, but that does not mean that the state is the only one that may initiate action. There is really no reason for the courts to free an accused simply because a dilatory prosecutor has 'gone to sleep at the switch' (no reference to counsel in this case) while the defendant and his counsel rest in silence. We hold that these solicitous provisions are not to be used as offensive weapons, but are for the benefit of defendants who claim their protection. They are a shield, and, as said in State v. Rowley, 198 Iowa, 613, * * *, they 'must not be left hanging on the wall of the armory.' *There is no just reason why an accused should not demand a trial, resist a postponement, or take some action indicating to the court that he believes he is being deprived of his statutory or constitutional rights as a foundation for his application for a dismissal.* The right to a speedy trial is valuable, and it will be zealously guarded by the courts with resolute courage. It is for the protection of personal rights, not to embarrass the adminis-

tration of the criminal law nor to defeat public justice. It is a privilege to the accused. If he does not claim it, he should not complain. It may be waived. The statute is a means of enforcing the constitutional provision. The spirit of the law is that the accused must go on record in the attitude of demanding a trial or resisting delay. If he does not do this, he must be held, in law, to have waived the privilege. *Until he has so acted, the state is not called upon to establish the existence of the statutory 'good cause.'* State v. Artz, 154 Minn. 290, 191 N.W. 605; State v. Dinger, 51 N.D. 98, 199 N.W. 196 and cases cited; 44 L.R.A. (N.S.) 871, note. Upon the record, defendant was not entitled to the relief sought." (Emphasis added.)

We find nothing in the record to establish that the delay was "purposeful" on the part of the State, or that it was "oppressive" to the accused. And we are not persuaded by appellee's affidavit, the only one filed by him in support of his motion to dismiss, that he has suffered any substantial prejudice by the delay.

We have examined such cases as *Williams* v. *United States*, 250 F. 2d 19, *Taylor* v. *United States*, 238 F. 2d 259, *United States* v. *Gunther*, 259 F. 2d 173, *United States* v. *McWilliams*, 163 F. 2d 695 (all D.C. Cir.), *Petition of Provoo*, 17 F. F.R.D. 183 (D.C., Md., 1955), and *United States* v. *Chase*, 135 F. Supp. 230, (N.D. Ill.), wherein indictments were dismissed on the ground of a denial to the accused of a speedy trial. *In all of these cases, the accused was incarcerated for all, or a large portion, of the time of delay; in some, the Courts specifically found a purposeful delay by the prosecution to harass the accused; and in most of them, the periods of delay far exceeded that in the case at bar.*

We hold that the appellee's course of inaction after the denial of his motion for an "immediate" trial (his failure to "demand a trial, * * *, or take some action indicating to the court that he [believed he was] being deprived of his

• • • constitutional rights as a foundation for his application for a dismissal") *was such as to constitute a waiver of his right to a speedy trial.* Upon remand, he, of course, will be entitled to a prompt and speedy trial, if he requests one.

ORDER DISMISSING THE INDICTMENT REVERSED, AND CASE REMANDED FOR FURTHER PROCEEDINGS; APPELLEE TO PAY THE COSTS.

APPENDIX B

Constitution of the United States

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX C

Maryland Declaration of Rights

Article 21. Rights of accused; indictment; counsel; confrontation; speedy trial; impartial and unanimous jury.

That in all criminal prosecutions, every man have a right to be informed of the accusation against him; to have a copy of the indictment, or charge, in due time (if required) to prepare for his defense; to be allowed counsel to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.